IN THE COURT OF APPEALS OF IOWA

No. 0-789 / 10-0180
Filed December 8, 2010

CHARLES FURNALD,
Plaintiff-Appellant,

vs.

ANTHONY HUGHES and EMCASCO INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the Iowa District Court for Warren County, William H. Joy, Judge.

Plaintiff appeals the district court's ruling dismissing his second lawsuit for failure to meet the burden of proof under Iowa Code section 614.10 (2009). **AFFIRMED.**

David Hirsch of Harding Law Office, Des Moines, for appellant.

Jon A. Vasey of Elverson, Vasey, & Peterson, L.L.P., Des Moines, for appellee Anthony Hughes.

Scott Wormsley of Bradshaw, Fowler, Proctor, and Fairgrave, P.C., Des Moines, of appellee EMCASCO Insurance Company.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ.

EISENHAUER, P.J.

Charles Furnald appeals the district court's ruling dismissing his second lawsuit for failure to meet the burden of proof imposed under Iowa's savings statute, Iowa Code section 614.10 (2009). We affirm.

***I. Background Facts and Proceedings*.**

On July 28, 2006, Charles Furnald was involved in a motor vehicle collision while at work. On October 17, 2007, Furnald filed a personal injury suit against Hughes, and included an under-insured/uninsured claim against EMCASCO Insurance Company. By an order filed April 30, 2008, the jury trial was set for April 14, 2009. At some point, prior to February 27, 2009, according to Hughes, the parties agreed to binding arbitration and scheduled it for April 14, the day of the trial. On April 3, 2009, eleven days before the arbitration and trial were to begin, Furnald filed a dismissal without prejudice.

On June 29, 2009, Furnald filed an identical personal injury suit against Hughes and EMCASCO, asserting the same facts as those in the October 2007 petition except it also asserted the petition was "brought under [Iowa Code section] 614.10."[1] Hughes filed his answer and asserted Furnald's suit was not brought within the applicable two-year statute of limitations and was thus barred.[2]

Hughes filed a motion for summary judgment arguing Furnald's second petition was not saved by section 614.10. Furnald resisted, stating he had a

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[1] Iowa Code section 614.10 provides:

> If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.

[2] Iowa Code section 614.1(2) provides actions founded on injuries to the person must be brought within two years. This two-year period had expired before Furnald dismissed his first lawsuit.

continuing decline in his physical functioning as a result of the motor vehicle collision. He stated "[a]s the arbitration date drew close, he began having more problems with his neck and shoulder, with pain and weakness radiating to his left arm." He asserted the sole reason for the dismissal was to allow a better evaluation of his continuing decline. He stated he could have tried the matter at an earlier date, "but his medical condition was such that it would have been less certain for the physicians to state what his permanent disability will be." "Due to the evolving nature of the injuries," and "given the proximity of the trial date and arbitration," Furnald "elected to cut the Gordian knot," and simply dismiss and re-file, "rather than fight the continuance battle."

Following an unreported hearing on the motion, the district court granted Hughes's motion, finding Furnald had failed to meet the burden of proof imposed under section 614.10.

Furnald appeals.

***II. Scope and Standards of Review*.**

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.907 (2009); *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 873 (Iowa 2007). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Walderbach v. Archdiocese of Dubuque, Inc*., 730 N.W.2d 198, 199 (Iowa 2007). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Walderbach*, 730 N.W.2d at 199. The court reviews

the record in a light most favorable to the opposing party. *Frontier Leasing Corp. v. Links Eng'g, L.L.C.*, 781 N.W.2d 772, 775 (Iowa 2010). We afford the opposing party every legitimate inference the record will bear. *Id*. "No fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts." *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006) (citation omitted).

***III. Discussion*.**

Generally, "when an action is dismissed without prejudice, the statute of limitations will bar a subsequent suit if the statute runs in the interim." 54 C.J.S. *Limitation of Actions* § 347, at 409 (2010). If the initial action is dismissed,

> the applicable statute of limitations does not toll unless a "savings statute" exists which provides for the filing of a second action within a specific amount of time, even if the statute of limitations would have otherwise expired. Under such "savings statutes," also known as "renewal" or "extension" statutes, plaintiffs are afforded the opportunity to bring a new action after the running of the limitations period when the effort to bring the original action in a timely manner fails otherwise than on its merits. . . . In effect, a savings statute confers upon a plaintiff who files a second action within the designated time period of a voluntary nonsuit of the first action, the same procedural and substantive benefits that were available to the plaintiff in the first action.

Id. at 409-10 (internal footnotes omitted). The savings statute allows "a litigant a new chance where he has been thrown out of court on a procedural point and not due to his own negligence . . . ." *Boomhower v. Cerro Gordo County Bd. of Supervisors*, 173 N.W.2d 95, 98 (Iowa 1969) (Becker, J., dissenting).

There are four prerequisites to relief under section 614.10 to preserve an action: (1) the failure of the former action must not have been caused by the plaintiff's negligence; (2) the commencement of a new action must be brought

within six months of the failure of the first action; (3) the parties must be the same; and (4) the cause of action must be the same. *Beilke v. Droz*, 316 N.W.2d 912, 913 (Iowa 1982). The plaintiff has the burden of proving entitlement to relief under this Code section. *See Sautter v. Interstate Power Co.*, 563 N.W.2d 609, 610 (Iowa 1997). In the case before us the parties dispute only whether the first requirement has been met.

Although section 614.10 and its predecessors have been on the books since 1843, there are few reported appellate decisions concerning application of the savings statute to voluntary, as opposed to involuntary, dismissals. A common thread runs through all: In order to take advantage of the provisions of the savings statute, one who voluntarily dismisses a lawsuit must do so under some compulsion.[3]

In *Archer v. Chicago*, *Burlington & Quincy Railroad Co.*, 65 Iowa 611, 611, 22 N.W. 894, 894 (1885), plaintiff began an action for personal injury in state court, which the defendant had removed to federal court. Plaintiff dismissed the case because he felt he could not obtain a fair trial in federal court. *Archer*, 65 Iowa at 611, 22 N.W. at 894. He refiled his case in state court, and the defendant claimed it was barred by the applicable statute of limitations. *Id*. Plaintiff argued his case was saved by the savings statute, which is now section 614.10. *Id*. In affirming the district court's dismissal, the court, in dicta,

[3] Furnald cites to *Davis v. Liberty Mutual Insurance Co.*, 55 F.3d 1365 (8th Cir. 1995), in support of his position. In analyzing Iowa case law concerning section 614.10, the Eighth Circuit Court of Appeals suggests "the requirement that a plaintiff be under some compulsion to dismiss seems to have been abandoned after *Weisz* [*v. Moore*, 222 Iowa 492, 265 N.W. 606, 606 (1936)]." *Davis*, 55 F.3d at 1368. Having done our own analysis of the Iowa case law, we respectfully disagree.

suggested a party must be under some compulsion to voluntarily dismiss before being able to invoke section 614.10. *Id.* at 613, 22 N.W. at 895.

In *Pardey v. Town of Mechanicsville*, 112 Iowa 68, 69, 83 N.W. 828, 828 (1900), plaintiff filed an action for personal injuries. During trial, at the conclusion of the testimony and after defendant moved for a verdict, plaintiff dismissed her suit without prejudice. *Pardey*, 112 Iowa at 70, 83 N.W. at 828. She alleged the defendant's officers had gotten her principal witness drunk to the point the witness was wholly unfit and incompetent to testify. *Id*. She also believed defendant's officers influenced several other witnesses. *Id*. Deeming it unsafe to put the witnesses on the stand and believing it would be an advantage to further investigate, and that her star witness would be in better condition to testify later on, she dismissed her action without first asking for a continuance or delay of a few hours. *Id*. Citing to *Archer*, the *Pardey* court concluded "[t]he dismissal was voluntary, not compulsory, and to thus dismiss the case was negligence in its prosecution." 112 Iowa at 71, 83 N.W. at 829.

Ceprley v. Town of Paton, 120 Iowa 559, 559, 95 N.W. 179, 179 (1903), was another personal injury action. During trial, at the close of testimony, and for the purpose of avoiding a directed verdict against plaintiff, which the trial court had intimated it would grant, plaintiff dismissed the action. *Ceprley*, 120 Iowa at 560, 95 N.W. 179. Upon refiling the case, the question was whether plaintiff's failure to recover in the first action was due to his negligence in its prosecution. *Id*., 95 N.W. at 180. At trial, defendant presented evidence plaintiff alleged he could not have anticipated. *Id*. at 560-61, 95 N.W. at 180. Plaintiff further alleged witnesses to contradict the unanticipated evidence were far away and it

was impossible to have them at trial. *Id*. at 561, 95 N.W. 180. The court found plaintiff's diligence lacking. *Id*. Citing to *Pardey*, the court concluded:

> If the desired witnesses could have been discovered and produced within a reasonable time, and with but a slight delay in the trial of the cause, no doubt the trial court would, on application, have granted time to get them. If plaintiff could not have secured the witnesses in time, he should have asked for a continuance. Diligence required that the plaintiff should have endeavored in one of these two methods, or in any other way open to him, to avoid the necessity of dismissing his action. There is no allegation in the petition in the present case that any effort whatever was made to discover the desired witnesses or secure them, nor are there any facts alleged which show us that it was impossible to do so.

Id. at 561-62, 95 N.W. 180 (internal citation omitted).

In *Weisz v. Moore,* 222 Iowa 492, 499, 265 N.W. 606, 610 (1936), plaintiff's attorney received a telephone message from the presiding judge on a Wednesday afternoon informing the attorney that his client's case would be called for trial the next morning. Because plaintiff and plaintiff's attorney were so distant from the place of trial, the attorney told the judge he could try the case that week but it was impossible for him to begin trial the next morning. *Weisz*, 222 Iowa at 499, 265 N.W. at 610.

> [T]he presiding judge told plaintiff's attorney that, if the case was to be tried before him, the trial would have to be commenced the following day, because he, the judge, had been assigned to other duties for the following week, and the trial must be completed before that time, and that he, the judge, could not delay the trial beyond the following day unless the defendants' attorneys consented to such delay. Plaintiff's attorney testified that he thereupon called the principal attorney for the defendants and tried to make some arrangement for a delay of the trial of the case, but was told that the defendants insisted upon the case being tried at that term of court, and that it could not be tried at that term of court unless arrangement could be made with the judge for some other time during the term. Plaintiff's attorney further testified that he then again called the presiding judge and asked if an arrangement could not be made by which the jury could be brought back later in

> the term and trial had at that time, and was told that this could not be done; and that he then told the presiding judge that, under these circumstances he was forced to dismiss the case, and asked the judge to enter an order dismissing it, without prejudice.

Id. at 499-500, 265 N.W. at 610. The defendants, relying on *Archer* and *Pardey*, argued that because plaintiff failed to file a motion to continue before instructing the court to dismiss the case, plaintiff was guilty of negligence. *Id*. at 497, 265 N.W. at 609. Noting the facts before the court were "entirely different" from those in *Archer* and *Pardey*, the *Weisz* court concluded:

> The evidence does not indicate any intention to unduly delay the trial of the case. The plaintiff merely asked for a sufficient delay so that he would be able to get to the place of trial and be prepared to enter the trial of the case. Under these circumstances, we do not think it can be said that there was a voluntary dismissal without any compulsion, because the plaintiff had not filed a formal motion for a continuance before dismissing the case.

Id. at 500, 265 N.W. at 610.

Furnald had an absolute right to unilaterally dismiss, without prejudice, his action more than ten days from the date of trial.[4] *Lawson v. Kurtzhals*, ___ N.W.2d ___, ___ (Iowa 2010); s*ee Vernard v. Winter*, 524 N.W.2d 163, 167 (Iowa 1994). Section 614.10 contains no prerequisite mandating that counsel request a continuance before filing a dismissal in order to be free of negligence in the prosecution of the case. Our case law does not require a plaintiff to file a formal motion for a continuance before dismissing a case in order to be saved under the statute. *Weisz*, 222 Iowa at 499-500, 265 N.W. at 610. Nevertheless,

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[4] Iowa Rule of Civil Procedure 1.943 provides:

> A party may, without order of the court, dismiss that party's own petition, counter-claim, cross-claim, or petition of intervention, at any time up until ten days before the trial is scheduled to begin. Thereafter a party may dismiss an action or that party's claim therein only by consent of the court which may impose such terms or conditions as it deems proper . . . .

in order to take advantage of the savings statute, our supreme court's decisions do require that a plaintiff first make at least some effort to continue or delay the trial before voluntarily dismissing the case. The record before us is devoid of any such efforts. We conclude the dismissal here was voluntary, not compulsory, and to thus dismiss the case was "negligence in its prosecution." Therefore, Furnald's second action was not saved by section 614.10.

***IV. Conclusion*.**

The trial court did not commit error in granting Hughes's motion for summary judgment. We therefore affirm.

AFFIRMED.

Potterfield, J., concurs; Doyle, J., dissents.

DOYLE, J. (dissenting)

I respectfully dissent. I agree Iowa's savings statute is not intended to reward unprepared parties, but such is not the case here. Furnald had a legitimate reason to delay resolution of his lawsuit. It appears his medical condition had deteriorated during the course of the litigation and further medical examinations were necessary to evaluate the permanency of his condition. As the trial and arbitration date was upon him, Furnald was faced with either attempting to continue the case or voluntarily dismissing and later re-filing under the protection of Iowa Code section 614.10 (2009). Furnald chose a voluntary dismissal within the time constraints of Iowa Rule of Civil Procedure 1.943. For his failure to first explore whether the trial could be continued or delayed, Furnald suffered the harshest of penalties; he was thrown out of court before the merits of his case could be decided. This is wrong.

The trial court relied upon three decisions in ruling that Furnald's counsel should have first conferred with opposing counsel and the court if necessary about a continuance or delay of the trial before filing the dismissal, and that the failure to do so was negligence: *Archer v. Chicago, Burlington & Quincy R.R. Co.*, 65 Iowa 611, 22 N.W. 894 (1885); *Pardey v. Town of Mechanicsville*, 112 Iowa 68, 83 N.W. 828 (1900); and *Ceprley v. Town of Paton*, 120 Iowa 559, 95 N.W. 179 (1903). I find these decisions distinguishable from the case at hand.

The origin of the requirement to first request a delay or continuance of the trial is derived from dicta in the *Archer* decision. In *Archer*, 65 Iowa at 611-12, 22 N.W. at 894, a plaintiff voluntarily dismissed his lawsuit after it had been removed to federal court. He re-filed the action in state court after the statute of limitations

had run. Seeking to apply the savings statute in the second suit, plaintiff asserted that he dismissed the first action, not because of any negligence on his part, but because he believed he could not obtain a fair trial in federal court. *Archer*, 65 Iowa at 611, 22 N.W. at 894. Observing the savings "statute provides that if the plaintiff fails in the action another may be brought," the court, in dicta, stated a voluntary dismissal under compulsion might be a type of failure as is contemplated by the statute. *Id*. at 612, 22 N.W. at 894. For an example the court stated:

> it is possible that the plaintiff may not be ready to try the case without negligence on his part, and yet be unable to obtain a continuance, and in such case, if the other party insists on a trial and the court should order it to proceed, the plaintiff might be under such compulsion to dismiss his action and commence a new action, which would be deemed a continuation of the first.

Id. at 612-13, 22 N.W. at 894. On the other hand, the court suggested it is not a failure as contemplated by the statute when a plaintiff, under no compulsion whatsoever, voluntarily dismisses a case for any reason. *Id*. at 613, 22 N.W. at 894.

> The real question involved in the case was whether the plaintiff's feeling that he could not obtain justice in the federal court was such a traversable fact as to relieve him of negligence in his failure to prosecute the prior action.

Weisz v. Moore, 222 Iowa 492, 498, 265 N.W. 606, 609 (1936) (discussing *Archer*). For public policy reasons, the court determined it could not consider the plaintiff's mere belief that he could not obtain a fair trial in federal court as a consideration of whether dismissal of the federal case was well-grounded. *Id*. at 613-14, 22 N.W. at 895.

Five years later, citing to *Archer*, the court in *Pardey* held that a voluntary dismissal made mid-trial was not compulsory because the plaintiff did not first ask for a delay or continuance. *See Pardey,* 112 Iowa at 71, 83 N.W. at 829. The court held "[t]he dismissal was voluntary, not compulsory, and to thus dismiss the case was negligence in its prosecution." *Id*.

In *Ceprley*, 120 Iowa at 561, 95 N.W. at 180, a plaintiff was faced with unexpected defense testimony during trial and could not get rebuttal witnesses to the trial in time to testify. At the close of testimony, and after the court intimated it would direct a verdict against him, the plaintiff filed a dismissal. *Ceprley*, 120 Iowa at 560, 95 N.W. at 179. The court found plaintiff's diligence lacking because there was no allegation that he made any effort to discover the desired witnesses or secure them, nor was it alleged it was impossible for him to have done so. *Id*. at 561, 95 N.W. at 180. The court speculated the trial court would have, on application, granted plaintiff time to obtain the desired witnesses, if the witnesses could have been discovered and produced within a reasonable time, and with but slight delay of the trial. *Id*. Further, the court suggested if the witnesses could not be secured in time, the plaintiff should have asked for a continuance. *Id*. Citing *Pardey*, the *Ceprley* court held diligence required plaintiff to either ask for a delay or continuance of the trial before filing the dismissal. *Id*. at 561-62, 95 N.W. at 180.

In affirming the dismissal of the second lawsuit, the *Archer* court did not determine whether the plaintiff's voluntary dismissal of the first was under compulsion; it merely suggested in dicta that a voluntary dismissal under compulsion might be a type of dismissal as is contemplated by the statute. *See*

Archer, 65 Iowa at 612, 22 N.W. at 894. Rather, *Archer* was decided on grounds that plaintiff's reason for dismissing his case was not well-grounded because what the plaintiff believed was immaterial and not traversable. *Id*. at 613-14, 22 N.W. at 895. Here, Furnald had a legitimate and determinable reason for the dismissal. *Pardey* and *Ceprley* were both mid-trial dismissals. *Pardey,* 112 Iowa at 71, 83 N.W. at 829; *Ceprley*, 120 Iowa at 560, 95 N.W. at 179. Unlike those plaintiffs in *Pardey* and *Ceprley*, Furnald dismissed his case in advance of trial, not mid-trial. I think the facts attending the dismissal in this case are entirely different from those in *Archer*, *Pardey*, and *Ceprley*.

In any event, the legal landscape has changed significantly since *Archer*, *Pardey*, and *Ceprley* were decided. At that time, the "right of the plaintiff to dismiss his cause of action at any time before the final submission thereto to the jury, or to the court, when the trial is without a jury" was conferred by statute, "and [wa]s absolute." *Ryan v. Phoenix Ins. Co. of Hartford*, 204 Iowa 655, 656, 215 N.W. 749, 750 (1927); *see also* Iowa Code §§ 3764 (1897), 11562 (1924), & 11562 (1931). Of course, unfettered mid-trial dismissals could "render[] useless the costs, expenses, and trouble that had been incurred [by the court, the litigants, and anyone else involved in the trial]." *Pardey*, 112 Iowa at 71, 83 N.W. at 829.

A plaintiff's right to freely and voluntarily dismiss a case was restricted when the statutory provision was replaced by the Iowa Rules of Civil Procedure enacted in 1943.[5] Rule 215 (now 1.943) then provided, in part: "A party may,

[5] The history of the rule is discussed in *Lawson v. Kurtzhals*, ___ N.W.2d ___ (Iowa 2010).

without order of court, dismiss his own petition . . . at any time before the trial has begun." Iowa R. Civ. P. 215 (Report 1943); *see also Mensing v. Sturgeon*, 250 Iowa 918, 923, 97 N.W.2d 145, 148 (1959) (quoting rule 215 and Report 1943). "This rule substantially changed the law on voluntary dismissal." Iowa R. Civ. P. 1.943 official cmt. (2009). The right to dismiss a case was "considerably" limited. *See* Alan Loth, *Trial and Judgment*, 29 Iowa L. Rev. 35, 45 (1943). Under the new rule, one could dismiss voluntarily as a matter of right at any time before the trial began, but thereafter, one could only dismiss with consent of the court, which could impose terms, such as requiring the dismissal to be expressly made with prejudice. *Id*. at 45-46. "The Advisory Committee, commenting on Rule 215 . . . , said: 'The rule is designed to prevent indiscriminate dismissals of actions by the parties litigant.'" Iowa R. Civ. P. 1.943 official cmt.

A plaintiff's right to voluntarily dismiss was further restricted in 1990, when the rule was amended to provide that a party may dismiss at any time up until ten days before trial. Thereafter, consent of the court is required, and the court may impose such terms and conditions it deems proper. Iowa R. Civ. P. 1.943 (2009). With a concern about the fairness of permitting voluntary dismissals at the last minute before trial, this amendment was adopted to give

> the court notice prior to trial that a case will not be proceeding so that time can be used more efficiently. Any problems in the case should be known at least ten days prior to trial except in unusual circumstances.

Iowa R. Civ. P. 1.943 official cmt. It appears to me that the problem of wasted time and resources caused by mid-trial dismissals has been cured by the rule. The judge-made solution of requiring some sort of compulsion, such as having a

request for a delay or continuance denied, is no longer necessary and should be discarded. *See Shook v. Crabb*, 281 N.W.2d 616, 618 (Iowa 1979). To be sure, it is recommended that counsel explore a delay or continuance before filing a dismissal, but it should not be a requirement under section 614.10.

The literal language of the savings statute does not require an attorney to first seek a continuance or delay in trial before filing a voluntary dismissal. Savings statutes are remedial in nature and must be liberally construed. 54 C.J.S. *Limitations of Actions* § 347, at 411 (2010). As Justice Cardozo wrote:

> The [savings] statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction.

Gaines v. City of New York, 109 N.E. 594, 596 (1915). Indeed, I agree with Iowa Supreme Court Justice Becker when he wrote:

> The public policy of the statute, which I take to be to allow a litigant a new chance where he has been thrown out of court on a procedural point and not due to his own negligence, should be recognized by this court. This public policy was first articulated by a predecessor statute in the Revised Statutes, 1843, (Terr.), chapter 94, [section] 9 and carried through our state Codes in its present form, commencing with the 1851 Code, to date.
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> The litigant should have his day in court and not be eliminated on procedural issues. To this end the legislature has done its part by passing section 614.10. We should do our part by construing the statute liberally to effectuate its purpose and assist the parties in obtaining justice. Section 4.2, Code, 1966.

Boomhower v. Cerro Gordo County Bd. of Supervisors, 173 N.W.2d 95, 98 (Iowa 1969) (Becker, J., dissenting).

Somehow the requirement that a voluntary dismissal must be made under some compulsion morphed from dicta in *Archer* to a court-made rule that has not

been analyzed or examined in any reported Iowa appellate decision since 1936.[6] Times have changed and I see no reason to be bound by the antiquated rule. With nothing in the record to indicate Furnald was negligent in the prosecution of his case, I would hold that he is entitled to the protection of section 614.10. I would therefore reverse the district court's ruling.

[6] *See Weisz*, 222 Iowa at 499, 265 N.W. at 610 (finding that although the plaintiff had not filed a formal motion for a continuance before dismissing the case, there was not a voluntary dismissal without any compulsion because, under the circumstances of the case, the plaintiff had taken some measures to reschedule the case).